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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1069

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY,
Petitioners,

v.

DAN SMOOT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
Citations to Opinions below	2
Jurisdiction	2
Questions presented	2
Constitutional provision, statute, and rules involved	3
Statement	3
Reasons for granting the writ	6
Conclusion	13
Appendices	1a-27a
Table of Contents to Appendices	iiia
Appendix A — Opinions Below	iiia
Appendix B — Related District Court Opinion	iiia
Appendix C — Constitutional provision, statute, and rules involved	iva

CITATIONS

	Page
Cases:	
Bell v. School Board of Powhatan County, 321 F.2d 494 (4th Cir. 1963)	7
Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964)	12
Lamont v. Postmaster General, 381 U.S. 301 (1965)	8
Lawrence v. Fuld, 32 F.R.D. 329 (D. Md. 1963)	12
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	6, 9
Universal Oil Products v. Root, 328 U.S. 575 (1946)	11
Rules:	
Federal Rules of Civil Procedure	
41(a)	2, 3, 5, 12
54(d)	3, 10
Miscellaneous:	
2B Barron & Holtzoff, *Federal Practice & Procedure* Section 914 (Wright ed. 1961)	12
77 *Harvard Law Review*, 1135 (1964)	11
The New York Times April 4, 1964	8
6 Moore, *Federal Practice*, para. 54.77(2)	11
Prosser, *Law of Torts*, Section 95 (2d ed. 1955)	6
Yankwich, *It's Libel or Contempt if You Print It* (1950)	6

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Petitioners, the defendants in Civil Actions No. 4708 and 4709 now pending in the United States District Court for the Western District of Michigan, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case[1] on December 13, 1965.

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1 *Sub. nom. Dan Smoot v. Honorable Noel P. Fox, United States District Judge for the Western District of Michigan.* The judgment was entered granting a writ of prohibition as prayed by Smoot prohibiting the District Judge from holding a hearing on costs.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is unreported and is printed in Appendix A hereto, *infra*, p. 9a. The opinion of the Sixth Circuit Court of Appeals, printed in Appendix A hereto, *infra*, p. 2a, is reported in 353 F.2d 830.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals, *infra*, p. 1a, was entered on December 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the protection of rights guaranteed by the First Amendment to the United States Constitution requires that a district judge have discretionary power to assess counsel fees and expenses as costs against a party who is found to have brought a libel action in bad faith, vexatiously, and for the oppressive purpose of stifling debate on public issues.

2. Whether as a matter of federal courts law a district judge has discretionary power in actions at law as well as in equity to assess counsel fees and expenses as costs against one who is found to have brought an action in bad faith, vexatiously, and for an oppressive purpose, and who seeks to dismiss the action on the eve of trial.

3. Whether under Rule 41(a)(2) of the Federal Rules of Civil Procedure a district judge may condition a dismissal with prejudice upon the payment of counsel fees and expenses, where the action is found to have been brought in bad faith, vexatiously, and for an oppressive purpose, and where the dismissal is sought on the eve of trial.

CONSTITUTIONAL PROVISION, STATUTE, AND RULES INVOLVED

The constitutional provision involved is the First Amendment to the United States Constitution. It is printed in Appendix C hereto, *infra*, p. 26a. The statute involved is 28 U.S.C. Section 1920, 62 Stat. 955. It is printed in Appendix C hereto, *infra*, p. 26a. The rules involved are Rules 41(a) and 54(d) of the Federal Rules of Civil Procedure. Each is printed in Appendix C hereto, *infra*, p. 27a.

STATEMENT

On March 21, 1964, the respondent, a nationally known political commentator, filed two libel actions in the United States District Court for the Western District of Michigan against the petitioners, the League of Women Voters of the Grand Traverse Area of Michigan, an unincorporated, non-partisan political information group, and certain of its members, Florabelle Grosvenor, Mary Force, Margot Power, and Sara Hardy. The jurisdiction of the district court was invoked because of diversity of citizenship, Smoot being a citizen of Texas and petitioners citizens of Michigan.

The libel actions were based on statements published by the League critical of respondent's widely distributed series of television programs. These statements had charged that respondent relied on "slanted information, half-truths, innuendoes, and sometimes worse," had expressed concern over the atmosphere of hate surrounding the recent assassination of the President and the bombing of Negro churches, and had urged the League's members, and the public, to watch the programs critically. Smoot's verified complaints alleged malice and asked damages totaling one million dollars. (Ex. 1 to Petition for Writ of Prohibition and Mandamus in Docket No. 16,207.)[2] During dis-

2 The record was not paginated by the Court of Appeals, and references, therefore, will be made by title to individual items within the record. The records of proceedings in Docket No. 16,207 and 16,501 were incorporated by reference into the record in Docket No. 16,565 in respondent's Petition for Writ of Prohibition.

covery, Smoot relied on tactics of obstruction, harassment, and delay,[3] as a result of which the district court ordered him to put up security for costs, including petitioners' counsel fees.[4] On the eve of trial, after petitioners had incurred expenses and legal fees of over thirty thousand dollars preparing their defense,[5] Smoot moved to dismiss his actions with prejudice. The district court denied this motion,[6] whereupon Smoot obtained a writ of prohibition and mandamus from the Sixth Circuit Court of Appeals, directing the lower court to dismiss the actions with prejudice "subject to the payment of all court costs by the Plaintiff." *Smoot v. Fox,* 340 F.2d 301 (6th Cir. 1964).

On February 2, 1965, petitioners filed a Motion for Assessment of Costs, alleging and offering to prove that the libel actions had been brought in bad faith, vexatiously, and for the oppressive purpose of inhibiting and stifling petitioners' criticism, and asking that respondent be ordered to pay their counsel fees. (Exs. Nos. 1 and 2 to Petition for Writ of Prohibition in Docket No. 16,505.) A motion by Smoot to dismiss petitioners' Motion for Assessment of Costs was denied April 19, 1965, by the Honorable Noel P. Fox, District Judge, in an opinion concurred in by Chief

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3 Respondent was tardy in answering interrogatories, did not answer them completely, and took over a month and a half to comply with the court's order to answer further. He failed to produce almost two hundred documents which he had been ordered to produce by the court, although they were admittedly in his possession. He objected to the taking of his deposition on specious grounds. He failed to comply with the court's order that he provide defendants with an itemization of special damages. He sought a last-minute continuance. (See 36 F.R.D. 4 (W.D. Mich. 1964), *infra* p. 21a.) He moved to disqualify the district judge on admittedly insufficient grounds. He was unable to exchange a witness list at the pre-trial, and his counsel appeared at the pre-trial lacking full authority to act for him.

4 The district court's unreported opinion is printed in Appendix B hereto, *infra* p. 18a.

5 Fees of this magnitude resulted in part from the preparation of the defense of truth. By the time dismissal was sought, counsel for petitioners had interviewed witnesses in New York, Washington, D.C., Boston, Chattanooga, Tennessee, and several cities in Michigan, sifted through and organized thousands of pages of documentary exhibits, and made final scheduling of witnesses and preparation of proofs for trial. In addition, the cost of defense was materially increased due to respondent's obstructive and delaying tactics, including his refusals to comply with the district court's discovery orders and his repeated attempts to delay the progress of the action, all of which necessitated time-consuming court appearances.

6 The district court's unreported opinion is printed in Appendix B hereto, *infra,* p. 14a.

Judge Kent and Senior Judge Starr.[7] Judge Fox proceeded to set a date for a hearing on petitioners' motion.

On May 12, 1965, before any hearing was held, the Court of Appeals for the Sixth Circuit issued an order directing Judge Fox to show cause why Smoot's petition for a second writ of prohibition should not be granted, this time prohibiting a hearing on the assessment of costs. Subsequently, on December 13, 1965, the Sixth Circuit rendered its judgment granting the writ of prohibition. The court acknowledged that counsel fees as costs were allowable in equitable actions but stated that "no authority has been found or cited holding that a district court has discretion to allow attorney's fees and expenses as part of the costs in an action at law." 353 F.2d 832, *infra*, p. 5a. The court rejected all arguments based on Rule 41(a)(2) of the Federal Rules of Civil Procedure, holding that that rule allows the setting of conditions only in the case of dismissals without prejudice. As to petitioners' contention that the threat of a baseless libel action has the effect of silencing criticism for fear of the expenses involved in proving the truth of the alleged libelous statements, the court said: "We see no merit in this claim. Defendants have the right of free speech so long as their statements are not libelous. The Constitution does not protect libelous statements." 353 F.2d 833, *infra*, p. 6a. The court also stated that a hearing as to whether counsel fees should be assessed as costs would be equivalent to the trial of an action for malicious prosecution of a civil action, and respondent therefore would be deprived of his right to trial by jury.[8]

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7 Judge Fox invited Judges Kent and Starr to join in the consideration of the case because of its great public importance.

8 In the course of oral argument before the Court of Appeals it was established that no request had ever been made that a jury be called in for the hearing on costs, although the district court could have done so pursuant to Rule 39 of the Federal Rules of Civil Procedure, and although the district court's earlier action in granting respondent's belated motion for a jury trial, *infra*, p. 18a, indicated that such a request would have been received favorably.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the principles set forth in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). There it was held that adequate protection of First Amendment rights requires that criticism of public officials be privileged so long as not actuated by malice. Underlying that holding were the principles that the law of libel "can claim no talismanic immunity from constitutional limitations," 376 U.S. 269, that those who would speak out on matters of public concern should not be "deterred from voicing their criticism, even though it is in fact true, because of doubt whether it can be proved in court or *fear of the expense of having to do so,*" 376 U.S. 279 (emphasis added), and that the Constitution expresses "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." 376 U.S. 270.

The institution of a groundless libel action imposes a heavy economic burden on the defendant,[9] especially when he must rely on truth as his defense.[10] When the alleged libel is uttered during debate on public issues, it is clear that this debate will be inhibited[11] unless the defendant can, upon showing that the action was brought in bad faith, vexatiously, and for the oppressive purpose of stifling that debate, recover the expense he has incurred in preparing his defense.[12] In the present case, petitioners, in order to "win" the libel actions, incurred fees and ex-

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9 See Yankwich, *It's Libel or Contempt if You Print It,* 355-56 (1950).

10 Respondent's verified complaints alleged malice, thus forcing petitioners to rely on truth as their defense.

11 Following the institution of this action, respondent's program continued to be shown in Traverse City, but neither the League nor anyone else criticized or challenged it.

12 *The New York Times* decision does not, of itself, alleviate the burden of defense when malice is alleged. Defense counsel must consider the possibility of an adverse jury finding on that issue, bearing in mind that malice may be established by showing that the allegedly defamatory statements are untrue, and that the defamer had no reasonable grounds on which to believe them true. *Prosser, Law of Torts,* §95 (2d ed. 1955). In the present case, counsel for petitioners concluded that the only safe course of action was to be fully prepared to show truth. It was the preparation of this defense which caused most of petitioners' counsel fees.

penses of over thirty thousand dollars. To call such a victory Pyrrhic is to understate the case; bluntly put, petitioners do not have the funds to pay it and cannot afford to "win" again. Unless they can be reimbursed, petitioners will remain silent in the future, having been "deterred from voicing their criticism, even though it is in fact true, because of . . . fear of the expense of having to" prove it true.

The position urged by petitioners requires no sweeping revision of the law of libel. Indeed, the substantive law of libel is scarcely involved at all; at issue here are baseless libel actions brought in bad faith and for the purpose of muting criticism. Nor do petitioners contend that in every such case the district judge must allow full counsel fees and expenses as costs. Petitioners do urge, however, that the district judge must have discretion to allow such costs. Otherwise, the federal courts could be used with impunity to deprive groups and individuals such as petitioners of their constitutional rights. Proper judicial supervision of the administration of justice in the federal courts requires that those courts not permit themselves to be used so as to endanger the very constitutional rights they were created in part to protect.

The court of appeals told petitioners that they "have the right of free speech so long as their statements are not libelous."[13] This simplistic brushing aside of petitioners' serious constitutional claim suggests that the court of appeals either failed to understand or refused to follow the principles enunciated in *New York Times*. In either case, the pernicious effect of its holding, which permits courts of justice to be used as instruments for the intimidation of those who would speak out on public issues, must be extirpated. Petitioners seek only the right to enter again into active debate on public issues.

2. The decision below is in conflict with the principle underlying the decision of the Fourth Circuit Court of Appeals in *Bell v. School Board of Powhatan County*, 321 F.2d 494 (4th Cir. 1963). There the defendant school board followed a pattern of evasion and obstruction, forcing plaintiffs to turn to the courts to secure rights clearly guaranteed

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13 353 F.2d 833, *infra*, p. 6a.

them by the Constitution. The Fourth Circuit held that in such circumstances the defendant should be required to pay the counsel fees and expenses which its wrongful actions forced the plaintiffs to incur. Here, as there, one party, acting vexatiously and in bad faith, has placed upon others such a heavy burden of litigation that unless they can be reimbursed they will be forced to avoid such litigation and thereby lose constitutionally protected rights. The sound principle of *Bell* is that the economic burden of legal action may not be used to deprive a party of constitutional rights, and that the court therefore has the power to award vexatious costs. Although *Bell* involved the rights of Negro schoolchildren to equal protection of the laws, the right to freedom of expression under the First Amendment is no less jealously to be protected. *Lamont v. Postmaster General,* 381 U.S. 301, 309 (1965) (concurring opinion).

3. This is a case of great public importance. The decision below holds that those who would criticize public commentators do so at the peril of being heavily penalized by the institution of baseless libel actions. The machinery of the courts thus becomes a potent and frightening weapon in the hands of those who would intimidate and silence the voices that disagree with them. Petitioners were prepared to show that the present action is not the only instance of Smoot's use of the law of libel in attempts to silence his critics.[14] Nor is he alone in the use of libel suits for intimidation of opponents.[15] In April, 1964, for example, at least 17 libel actions, seeking total damages in excess of 288 million dollars, and brought by public officials in three southern states against newspapers, magazines, and a television network, were pending in state and federal courts.[16]

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14 For example, counsel are aware of letters written by respondent in March, 1964 demanding retraction of certain statements made by a California radio announcer and charging that respondent considered those statements slanderous and defamatory in nature and that they were uttered with malicious intent.

15 The reecnt experience of the Santa Barbara, California, chapter of the United Nations Association is significant. The group planned a television show dealing with controversial topics. Prior to the showing they were informed that a libel action for a million dollars would be filed if the program were shown. The group withdrew the program.

16 *The New York Times,* April 4, 1964, p. 12.

The decision below, if allowed to stand, will have wide-ranging and harmful consequences. If those who speak out on public matters can inflict upon their critics a fine greater than that normally set by law for the commission of a felony merely by filing a baseless action in federal court, then such actions will find ever-increasing popularity. Large newspapers, magazines, and other such enterprises will, as Mr. Justice Black pointed out in the *New York Times* case, 376 U.S. 269, 295 (concurring opinion), be unable to afford such penalties. How much more will the League of Women Voters of the Grand Traverse Area of Michigan, and similar such groups across the country, be unable to afford them?

The timing and handling of respondent's lawsuits reveals the purpose they served. Immediately after the suits were commenced, in March of 1964, petitioners began to seek an early trial date — it was an election year, and they wanted to be free to answer respondent on election issues. But Smoot's delaying and obstructive tactics dragged the case on into autumn. During the pendency of the suit, petitioners were almost completely silenced, while Dan Smoot went on, week after week, uninterrupted and free of critical response. The threat posed by the Sixth Circuit's holding in this case to that free and open discussion which necessarily underlies the democratic process must not be left unanswered.

In considering the public importance of this case, it should not be overlooked that the court of appeals has twice granted the extraordinary writ of prohibition. Furthermore, at the district court level, Senior Judge Starr and Chief Judge Kent deemed the case so important that they joined Judge Fox in ruling that a district judge did have the power to allow counsel fees as costs. At least six judges, then, have viewed this case as one of great public impact, involving questions which must be resolved promptly and with finality.[17]

It is also significant that dozens of organizations across the country have followed the course of this litigation closely. In particular, the groups who had planned to

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17 Of the six, three have ruled in petitioners' favor, and three against them.

send witnesses on the League's behalf[18] have all evidenced keen interest in the outcome of this case. The reason for their concern is apparent. If petitioners are not successful, then such organizations will be unable to answer their critics; they must remain silent in a one-sided debate. Free speech will have become a luxury available only to those who can afford to defend the baseless libel actions that will result from its exercise.

4. The decision below introduces an unwarranted law-equity distinction into federal civil procedure, which must not be allowed to stand. The court of appeals conceded,[19] in the face of overwhelming authority,[20] that counsel fees may be awarded as costs in actions in equity which are found to have been brought in bad faith, vexatiously, and for an oppressive purpose. However, it held that, despite the merger of law and equity in federal practice, such an award could not be made in actions at law. The court reasoned as follows:

> "We asked counsel for respondent at the oral argument if he could cite a single case where the Federal Courts had ever made such an allowance, and he was unable to do so. The fact that counsel could not support his contention with pertinent authority is fairly good proof that it lacks merit."[21]

Rule 54(d) of the Federal Rules of Civil Procedure vests the power to allow costs in federal district courts. It provides that "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs * * *." The Rule makes no distinction between actions at law and suits in equity, and commentators agree that under it the historic

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18 The following groups, among others, had witnesses ready to appear at the trial of the libel actions, and have followed the litigation closely from its inception: Committee for Economic Development; National Education Association; Tennessee Valley Authority; N.A.A.C.P.; National Municipal League; United Nations Association.

19 353 F.2d 832, *infra*, p. 4a.

20 See cases cited in Petitioners' Brief in Opposition to Petition for Writ of Prohibition in Docket No. 16,565.

21 353 F.2d 832 n.1, *infra*, p. 5a n.1.

power to allow counsel fees as costs is available in all actions.[22]

If, as the court of appeals deems so significant, there is no appellate authority allowing counsel fees as costs in an action at law, neither is there authority denying such costs because they are requested in an action at law. And the asserted distinction flies in the face of sense and reason. In the present day and age, the allowance or disallowance of attorneys' fees should not turn on whether a litigant in the time of Henry VIII would have brought such a case to the Lord Chancellor or to the Court of Common Pleas. The need to compensate defendants wrongfully brought into court, and the desirability of penalizing vexatious plaintiffs, are just as pressing when the complaint has sought money damages as when it prays injunctive relief. In *Universal Oil Products v. Root*, 328 U.S. 575 (1946), the Court said:

> "No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire costs of the proceeding could justly be assessed against the guilty parties. Such is precisely a situation where for 'dominating reasons of justice' a court may assess counsel fees as part of the taxable costs." *Id.* at 580.

To use the language of the Court, it is the "temple of justice" which must be protected, not the "temple of justice when sitting to hear equitable causes."

If this ill-advised and unmeritorious distinction between law actions and equity suits is permitted to stand, federal district judges will be stripped in a majority of the cases before them of an effective tool for policing their courts — the discretionary imposition of extraordinary costs. Petitioners submit that the anachronism set up by the court of appeals must be eliminated now, before it further undoes that which the Federal Rules of Civil Procedure attempted to accomplish in the merger of law and equity.

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22 6 *Moore, Federal Practice*, para. 54.77(2); Note, 77 *Harv. L. Rev.* 1135, 1138 (1964).

5. The decision below unduly restricts the operation of Rule 41(a)(2) of the Federal Rules of Civil Procedure. Rule 41(a)(2) provides that "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." This rule provides an additional ground upon which the court may allow counsel fees as costs, for it is well settled that such an allowance may be imposed as a condition of dismissal.[23] The court of appeals ruled, however, that Rule 41(a)(2) applies only to dismissals without prejudice.[24] Petitioners submit that the broad language of Rule 41(a)(2) should not be so limited, and that a district judge has the power, in an appropriate case, to tax counsel fees as a condition of a dismissal with prejudice.

6. The foregoing has demonstrated that the decision below was clearly incorrect. The conclusion of the court below that the taxation of counsel fees as costs would amount to an action for malicious prosecution, depriving respondent of his right to a jury trial, is without merit. As previously pointed out, respondent never requested a jury. Furthermore, an action for malicious prosecution seeks a wholly different measure of damages. Finally, the availability of the remedy of vexatious costs to safeguard the integrity of the federal courts and to protect constitutional rights cannot be made to turn on the vagaries of state law.[25] Nor does the court of appeals assert any grounds of policy to support its position.[26] The seriousness of the error

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23 2B Barron & Holtzoff, *Federal Practice and Procedure*, section 914, at 124 (Wright ed. 1961).

24 The court misread *Lawrence v. Fuld*, 32 F.R.D. 329 (D. Md. 1963), to support its position. That case merely held that in the absence of exceptional circumstances counsel fees would not be imposed as a condition of dismissal with prejudice. In the present case, special circumstances are present.

25 It is uncertain whether an action for malicious prosecution of a civil action would lie in Michigan without the attachment of property.

26 The case of *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964), lends no support to the court below. There the court upheld a district judge's taxation of costs under Rule 54(d), wherein he refused to tax the full expense of transporting witnesses

below and the burden thereby imposed on petitioners by the court of appeals' decision constitute sufficient reasons for the Court to grant this petition.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 28, 1966.

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26 (Continued)—

from Arabia to New York to the unsuccessful plaintiff. The court said "Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence, that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be. Therefore, the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." 379 U.S. 235. This language is not inconsistent with petitioners' position, especially when it is borne in mind that petitioners alleged bad faith and oppressive purpose. Indeed, the last sentence quoted seems to support petitioners' contention that, in a proper case, a district judge does have discretion to tax other than the ordinary costs.